No. 14-185

IN THE

Supreme Court of the United States

NOEL REYES MATA,

Petitioner,

v.

ERIC H. HOLDER, JR.,
ATTORNEY GENERAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 3

THE COURT SHOULD GRANT CERTIORARI AND SUMMARILY REVERSE OR SET THE CASE FOR ARGUMENT 3

A. Vacatur And Remand Without Resolution Of The Jurisdictional Question Would Unnecessarily Prolong This Case And Consume Court And Party Resources 3

B. The Government's Alternative Arguments For Denial Of Certiorari Are Misplaced 5

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Page(s)

Alzaarir v. *Attorney General*, 639 F.3d 86 (3d Cir. 2011) 3

Avagyan v. *Holder*, 646 F.3d 672 (9th Cir. 2011) 3

Avila-Santoyo v. *Attorney General*, 713 F.3d 1357 (11th Cir. 2013) 3

Burnett v. *New York Central Railroad Co.*, 380 U.S. 424 (1965) 10

Colorado River Water Conservation District v. *United States*, 424 U.S. 800 (1976) 5

Cruz Rendon v. *Holder*, 603 F.3d 1104 (9th Cir. 2010) 7

Cruz-Chavez v. *Holder*, 575 F. App'x 365 (5th Cir. 2014) 4

Gaberov v. *Mukasey*, 516 F.3d 590 (7th Cir. 2008) 3

Gordillo v. *Holder*, 640 F.3d 700 (6th Cir. 2011) 3

In re Andazola-Rivas, 23 I. & N. Dec. 319 (BIA 2002) 7

In re Fefe, 20 I. & N. Dec. 116 (BIA 1989) 7

In re Gonzalez Recinas, 23 I. & N. Dec. 467 (BIA 2002) 6, 7

In re Monreal-Aguinaga, 23 I. & N. Dec. 56 (BIA 2001) 6, 8

Kucana v. *Holder*, 558 U.S. 233 (2010) 4

Kuusk v. *Holder*, 732 F.3d 302 (4th Cir. 2013) 3

TABLE OF AUTHORITIES—Continued

Page(s)

Luna v. *Holder*, 637 F.3d 85 (2d Cir. 2011) 3

Neves v. *Holder*, 613 F.3d 30 (1st Cir. 2010) 3

Perez v. *United States*, 167 F.3d 913 (5th Cir. 1999) 10

Ramos-Bonilla v. *Mukasey*, 543 F.3d 216 (5th Cir. 2008) 3, 4, 5

Riley v. *INS*, 310 F.3d 1253 (10th Cir. 2002) 3

SEC v. *Chenery Corp.*, 318 U.S. 80 (1943) 9

Singh v. *Holder*, 2014 WL 5823318 (5th Cir. Nov. 11, 2014) 4

Socop-Gonzalez v. *INS*, 272 F.3d 1176 (9th Cir. 2001) 10, 11

Valencia v. *Holder*, 657 F.3d 745 (8th Cir. 2011) 3

Yuan Gao v. *Mukasey*, 519 F.3d 376 (7th Cir. 2008) 11

STATUTES AND REGULATIONS

8 U.S.C. § 1229b(b)(1)(D) 6

8 C.F.R. § 1.2 11

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REPLY BRIEF FOR PETITIONER

The government concedes that the Fifth Circuit's decision in this case was incorrect. The Court should grant the petition for certiorari and summarily reverse that decision or set the case for argument.

The Court should reject the government's suggestion of simply vacating and remanding to the Fifth Circuit for further proceedings. The Fifth Circuit has already refused to rehear this case en banc, and the government cannot assure this Court that the Fifth Circuit would proceed any differently now compared to how it proceeded six months ago. Remand to the Fifth Circuit without resolution of the question of that court's appel-

late jurisdiction would consume judicial and party resources without any guarantee that the parties will not be back before this Court raising the same issue.

Even less appropriate is the government's suggestion that the Court should *deny* the petition, thus depriving Mr. Mata of consideration of the merits of his appeal, which the government concedes the Fifth Circuit should have reached. The government's assertion that Mr. Mata is not entitled to relief is the very question that the Fifth Circuit should have addressed; the fact that the government believes it will ultimately prevail on the merits is not a reason to let an erroneous jurisdictional decision stand. Moreover, the government's arguments are misplaced. Before the immigration judge, Mr. Mata sought to present evidence, including testimony from three witnesses, that his U.S. citizen children would suffer exceptional and extremely unusual hardship if he were deported from the United States. The immigration judge refused to hear the testimony, pretermitted Mr. Mata's claim for relief, and ended the hearing based on a legal error—the very legal error that Mr. Mata sought to challenge on appeal, when he was stymied by his prior counsel's ineffectiveness. And contrary to the government's assertion, Mr. Mata diligently filed a motion to reopen through new counsel. It is the Fifth Circuit that should decide these issues in the first instance—not this Court and certainly not the government. We respectfully submit that the petition for certiorari should be granted and the judgment of the Fifth Circuit reversed, either summarily or after merits briefing and argument.

ARGUMENT

THE COURT SHOULD GRANT CERTIORARI AND SUMMARILY REVERSE OR SET THE CASE FOR ARGUMENT

A. Vacatur And Remand Without Resolution Of The Jurisdictional Question Would Unnecessarily Prolong This Case And Consume Court And Party Resources

Mr. Mata welcomes the government's concession of error, as well as its acknowledgement that the Fifth Circuit's position in *Ramos-Bonilla* v. *Mukasey*, 543 F.3d 216 (5th Cir. 2008), conflicts with that of the other ten circuits that have considered equitable tolling of the ninety-day filing deadline for motions to reopen immigration proceedings.[1] As the government notes, "*Ramos-Bonilla*'s conclusion that there is no jurisdiction in these circumstances is incorrect, and the court of appeals erred in relying on that precedent." U.S. Br. 12.

However, despite agreeing that the Fifth Circuit erred in concluding that it lacked jurisdiction to hear Mr. Mata's appeal, the government requests the wrong remedy. It argues (Br. 12) that the Court should vacate the judgment and remand this case to the Fifth Circuit so that the government can join a request for rehearing en banc, even though not one member of the court of appeals even requested a poll on rehearing en

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[1] *See Kuusk* v. *Holder*, 732 F.3d 302, 305 (4th Cir. 2013); *Avila-Santoyo* v. *Attorney Gen.*, 713 F.3d 1357, 1362 (11th Cir. 2013); *Valencia* v. *Holder*, 657 F.3d 745, 748-749 (8th Cir. 2011); *Avagyan* v. *Holder*, 646 F.3d 672, 679 (9th Cir. 2011); *Gordillo* v. *Holder*, 640 F.3d 700, 704-706 (6th Cir. 2011); *Luna* v. *Holder*, 637 F.3d 85, 104 (2d Cir. 2011); *Alzaarir* v. *Attorney Gen.*, 639 F.3d 86, 89 (3d Cir. 2011); *Neves* v. *Holder*, 613 F.3d 30, 35 (1st Cir. 2010); *Gaberov* v. *Mukasey*, 516 F.3d 590, 594-597 (7th Cir. 2008); *Riley* v. *INS*, 310 F.3d 1253, 1258 (10th Cir. 2002).

banc when given the opportunity in May of this year. Pet. App. 24-25. The most that the government can offer is the possibility that the Fifth Circuit "may" change its mind if the government says it should. U.S. Br. 20-21 ("[T]he Fifth Circuit *may* overturn *Ramos-Bonilla* in light of the government's position." (emphasis added)).

There is no reason to delay judicial review of the merits of Mr. Mata's appeal by forcing the case through potential en banc reconsideration, given the government's acknowledgment that *Ramos-Bonilla* is on the wrong side of a circuit split. In addition to consuming court and party resources needlessly, such a procedure risks leaving Mr. Mata in a position of having to refile the same petition for certiorari a second time, should the Fifth Circuit decline to rehear the case en banc or reaffirm its erroneous position upon rehearing. Indeed, the Fifth Circuit has already concluded that, in its view, this Court's decision in *Kucana* v. *Holder*, 558 U.S. 233 (2010), did not qualify as an "intervening change in law" warranting deviation from *Ramos-Bonilla*. Pet. App. 3. And since denying Mr. Mata's petition for rehearing six months ago, the Fifth Circuit has continued to rely on *Ramos-Bonilla* in ruling that it lacks jurisdiction to review requests for equitable tolling in the context of motions to reopen. *Singh* v. *Holder*, 2014 WL 5823318, at *1 (5th Cir. Nov. 11, 2014); *Cruz-Chavez* v. *Holder*, 575 F. App'x 365, 365-366 (5th Cir. 2014). Unless this Court reverses the Fifth Circuit's jurisdictional ruling, there is every possibility that that court will continue to adhere to its view, which would require Mr. Mata, after briefing and arguing the matter to the Fifth Circuit again, to petition for certiorari to this Court a second time. The government has shown no reason for following that circuitous and wasteful route.

Mr. Mata respectfully submits that summary reversal would be appropriate in this case. If the Court would prefer to receive further argument regarding the jurisdictional issue, the petition should be granted and the case set for argument, including the potential appointment of an amicus curiae to defend the judgment below if the Court sees fit.

B. The Government's Alternative Arguments For Denial Of Certiorari Are Misplaced

The Court should also reject the government's alternative suggestion that the Court should let the judgment below stand, even though the government concedes the Fifth Circuit should have reached the merits and erroneously refused to do so. The government's arguments for denying Mr. Mata the benefit of the appellate review to which even the government agrees he was entitled all lack merit.

1. The government reassures the Court that it will urge overruling of *Ramos-Bonilla* in "another appropriate case." U.S. Br. 18. But the Fifth Circuit's jurisdiction should not depend on which case the *government* thinks is an "appropriate" one in which to discard an acknowledged jurisdictional error. Rather, it is for the *court* to exercise the appellate jurisdiction that Congress has given it to decide the merits of Mr. Mata's request for equitable tolling. *Cf. Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976) (noting "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them"). Mr. Mata's claim that the BIA improperly dismissed his request to remain in the United States—his home for the past fourteen years and the home of his three U.S. citizen children—should not be discarded simply because his adversary does not believe that this is an "ap-

propriate" case in which to correct the Fifth Circuit's jurisdictional mistake.

2. The government alternatively argues that, even if the Fifth Circuit orders his case reopened, Mr. Mata would not ultimately prevail on his request for cancellation of removal. U.S. Br. 12. Of course, it is premature for this Court to consider Mr. Mata's ultimate eligibility for cancellation of removal before the Fifth Circuit has addressed the question. Nonetheless, since the government has raised it as a purported basis for depriving Mr. Mata of the right to invoke the Fifth Circuit's appellate jurisdiction, we briefly address the matter.

An applicant for cancellation of removal who is not a lawful permanent resident must show that his or her removal from the United States would cause "exceptional and extremely unusual hardship" to a U.S. citizen or lawful permanent resident spouse, parent, or child. 8 U.S.C. § 1229b(b)(1)(D). In this case, however, the immigration judge pretermitted Mr. Mata's application for cancellation of removal and forbade Mr. Mata from presenting any testimony or argument related to hardship. AR189-190.

The "exceptional and extremely unusual hardship" inquiry is highly fact-specific and requires consideration of the cumulative impact of a number of factors. *In re Gonzalez Recinas*, 23 I. & N. Dec. 467, 469-473 (BIA 2002); *In re Monreal-Aguinaga*, 23 I. & N. Dec. 56, 63-66 (BIA 2001). Relevant factors include the "ages, health, and circumstances" of an applicant's qualifying relatives and the potential impact on those relatives of adverse conditions in the applicant's country of return. *Monreal-Aguinaga*, 23 I. & N. Dec. at 63. They also include the length of time that an applicant and his or

her qualifying relatives have resided in the United States, the qualifying relatives' familiarity with the applicant's country of return (including whether they speak the language), the potential economic consequences of an applicant's removal, and the presence of family members in the United States and in the applicant's country of return. *Gonzalez Recinas*, 23 I. & N. Dec. at 469-472. Factors that relate to the applicant, as opposed to a qualifying relative, may also be considered "to the extent that they affect the potential level of hardship to ... qualifying relatives." *Id.* at 471.

Given the fact-specific nature of this inquiry, an applicant's in-court testimony about his or her particular family circumstances is often especially significant. *See, e.g.*, *Cruz Rendon* v. *Holder*, 603 F.3d 1104, 1109 (9th Cir. 2010) (holding that immigration judge denied applicant a full and fair hearing when judge precluded applicant from testifying about the life she had created for her son in the United States, her son's medical and educational needs, and the hardships her son would face if he were forced to relocate to Mexico). Indeed, in the related context of asylum proceedings, the BIA has noted that an applicant's testimony may be dispositive. *In re Fefe*, 20 I. & N. Dec. 116, 118 (BIA 1989) ("[T]here are cases where an alien establishes eligibility for asylum by means of his oral testimony when such eligibility would not have been established by the documents alone.").

Unsurprisingly, the BIA has repeatedly focused on applicant and witness testimony when considering whether an applicant has demonstrated the required level of hardship. *See Gonzalez Recinas*, 23 I. & N. Dec. at 470 (citing applicant's testimony concerning her financial circumstances); *In re Andazola-Rivas*, 23 I. & N. Dec. 319, 320 (BIA 2002) (citing applicant's testimo-

ny concerning her health, the fact that she had no relatives in Mexico who could help her take care of her children, her relationship with the children's father, and the limited educational opportunities for her children in Mexico); *Monreal-Aguinaga*, 23 I. & N. Dec. at 57, 64 (citing applicant's testimony concerning his children's health and the testimony of his twelve-year-old son concerning his language abilities and desire to remain in the United States).

Here, Mr. Mata submitted the birth certificates of his three U.S. citizen children ages ten, nine, and six. AR514-516. Mr. Mata also submitted a proposed witness list, indicating that he planned to call three witnesses in support of his case: his brother-in-law Enrique de Jesus Rodriguez, his sister-in-law Luz Maria White, and his work supervisor Cruz Ramon Arreola. AR518. Each witness planned to testify about his or her relationship with Mr. Mata, Mr. Mata's continuous residence in the United States for ten years (a separate requirement for cancellation of removal), and "the effect of separation if [Mr. Mata] were ordered removed." *Id.*

Nonetheless, after placing Mr. Mata under oath (AR203-204), the immigration judge pretermitted Mr. Mata's application for cancellation of removal because she found that his sole criminal conviction rendered him statutorily ineligible (AR207). The judge explained her decision to Mr. Mata and his prior attorney as follows:

> So what I'm going to do today ... is pretermit [Mr. Mata's] application. I'm not going to listen to any further testimony regarding the other elements of his eligibility for cancellation of removal. What I'm going to do, [is] deny the application.

AR207. Mr. Mata thus never had the opportunity to develop a record regarding the hardship that his removal would cause. The Court should not deprive Mr. Mata of the opportunity to present his case to the Fifth Circuit simply because he did not present evidence that the immigration judge expressly *forbade* him from presenting.

3. Finally, the government asserts that Mr. Mata would not be entitled to equitable tolling because he supposedly did not exercise "due diligence" in pursuing his motion to reopen based on ineffective assistance of counsel. U.S. Br. 19. But the BIA did not rule against Mr. Mata on this basis, either in denying his motion to reopen (AR66-67) or his motion to reconsider (AR3). As a result, the Fifth Circuit *could not* deny Mr. Mata's petition for review on such a ground. *See SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.").

Putting aside the Fifth Circuit's *inability* to rule against Mr. Mata based on the government's new "diligence" argument, the record does not support the government's assertion in any event. The BIA denied Mr. Mata's initial appeal on September 21, 2012, because his former counsel failed to file a brief. AR139. Contrary to the government's argument (Br. 19), the record does not indicate that Mr. Mata was served with the BIA's notice on September 21. Rather, the record indicates only that the BIA mailed Mr. Mata and his former attorney an English version of the decision *dated* September 21, 2012 (Mr. Mata communicated with the court through a Spanish interpreter throughout his immigration proceedings). AR137-139.

At that point, as the record indicates and the government essentially concedes (Br. 19-20), Mr. Mata moved expeditiously to evaluate his legal options and inquire whether he had a potential ineffective assistance of counsel claim. By October 15, 2012, Mr. Mata had already sought two separate attorneys' opinions concerning whether his former counsel had been ineffective. AR118-119. By October 17, 2012, he had filed a complaint against his former attorney with the Office of Chief Disciplinary Counsel for the State Bar of Texas. AR129-134. And by January 14, 2013, only 115 days after the date of the BIA's decision, Mr. Mata's new counsel moved to reopen the case. AR85. These actions all indicate that Mr. Mata did not "'sleep on his rights,'" but rather sought to reopen his case as soon as he could. *Perez* v. *United States*, 167 F.3d 913, 917 (5th Cir. 1999) (quoting *Burnett* v. *New York Cent. R.R. Co.*, 380 U.S. 424, 429 (1965)).

The government's argument relies not on the premise that Mr. Mata did not move quickly in responding to the BIA's denial of his appeal, but rather on the fact that he did not manage to file his motion to reopen within the ninety-day period. U.S. Br. 20. But as the Ninth Circuit has explained, equitable tolling of the ninety-day period "stops the clock," such that the "tolled" time is subtracted from the filing period. *Socop-Gonzalez* v. *INS*, 272 F.3d 1176, 1195 (9th Cir. 2001) (en banc) (emphasis omitted). Accordingly, the time before Mr. Mata learned that his counsel had been ineffective does not count against him. The government's argument that Mr. Mata knew of the ineffectiveness on October 15, 2012 (Br. 20) thus is not fatal, because ninety days from October 15, 2012 is Sunday, January 13, 2013—placing the due date on the next business day,

Monday January 14, 2013. *See* 8 C.F.R. § 1.2. Mr. Mata's new counsel filed the motion to reopen on that date.

While the Fifth Circuit and the BIA have not yet decided how equitable tolling should function in the context of immigration proceedings, the Ninth Circuit's approach is well-supported and would provide the courts and the BIA with "relative certainty and uniformity" in calculating and applying the statutory period. *See Socop-Gonzalez*, 272 F.3d at 1195 (a contrary approach would promote "inconsistency of application and uncertainty of calculation, thus undermining two of the purposes served by statutes of limitations"). In addition, the Ninth Circuit's approach is well aligned with congressional objectives in providing statutory limitations periods—"to permit plaintiffs to take a specified amount of time (even if they don't 'need it')." *Id.* at 1196.[2]

In sum, however, none of these issues is properly before this Court; only the Fifth Circuit's erroneous jurisdictional ruling is. That ruling prevented the Fifth Circuit from addressing any of the arguments that Mr. Mata or the government raised with respect to the BIA's refusal to reopen his case due to ineffective assistance of counsel. Mr. Mata and the government agree that the jurisdictional ruling cannot stand, and the government's untested challenges to Mr. Mata's merits position are not a reason to leave that jurisdictional error in place.

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[2] The Seventh Circuit has taken a different view. *Yuan Gao v. Mukasey*, 519 F.3d 376, 378 (7th Cir. 2008). Because neither the BIA nor the Fifth Circuit has taken a position on this issue, this Court should not prejudge it by denying certiorari in this case, but rather should leave it to proceedings on remand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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